TOPIC 18: ANTITRUST LAW

Overview

Antitrust law concerns the regulation of certain business practices that result in lower levels of competition among businesses in the market. A lower level of competition in a given market is generally understood to be detrimental to consumer interests. It can cause higher prices and shortages in supply or availability of products. This chapter introduces antitrust law and the primary federal statutes providing consumer protections. It then examines the various types of conduct or situations that are deemed illegal under these laws.

VIDEO LESSON - INTRODUCTION

VOCABULARY & CONCEPTS

- Antitrust Law
- Federal Trade Commission
- *The Sherman Act of 1890*
- *The Clayton Act of 1914*
- *The Federal Trade Commission Act of 1914*
- Contract, Combination, or Conspiracy in Restraint of Trade
- *Per Se* Illegality & Rule of Reason
- Monopoly
- Exemptions from Antitrust
- Sanctions Under Antitrust Law

- **Sherman Act**:
- Horizontal Restraint
  - Sharing Information
  - Refusal to Deal
  - Territorial Agreement
  - Price Fixing
- Vertical Restraint
  - Exclusive Dealing
  - Tying Arrangements
  - Territorial Agreements

- **Clayton Act**:
  - Price Discrimination
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  - Reciprocal Dealing
  - Mergers & Acquisitions
- Federal Trade Commission Act

TOPIC 18: ANTITRUST LAW - QUESTIONS & ANSWERS

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1. What is “antitrust law”?

“Antitrust laws” are a combination of federal and state laws that seek to promote competition among businesses (both large and small). Competition among businesses benefits consumers, as businesses compete by providing better or more goods and services at lower prices. In pursuit of growth and efficiency, business competitors often attempt to share some activities or join together in the performance of business functions. Many types of concerted efforts among competitors are perfectly legal, while others are prohibited by law and can lead to the severe sanctions. Concerted activities, such as sharing of resources and information, are often beneficial to society even though they reduce competition. The question or legality focuses on whether consumers suffer a detriment from the activity.

This area of law gained the name antitrust based upon historical practices by businesses employing trusts to monopolize industries and thwart competition. Basically, individuals or companies would set up trusts that they controlled to hold a controlling ownership interest in multiple industry competitors. In this way, a single individual or group of individuals could effectively exercise control over an entire industry and thereby diminish competition. The federal and state governments began passing laws to break up these holding trusts. As such, the name of such laws became antitrust laws.

- ***Discussion***: Why do you think the government concerns it self with industry competition and consumer welfare? Should it? Why or why not?

- ***Practice Question***: What are the legislative objectives behind the antitrust laws? Is all business activity that dominates a product market illegal under the antitrust laws? Why or why not?

- ***Resource Video***: http://thebusinessprofessor.com/what-is-antitrust-law/

2. What are the major antitrust laws in the United States?

Since the inception of antitrust law, the Federal Government has passed three sweeping antitrust laws:

- *The Sherman Act of 1890,*

- *The Clayton Act of 1914, and*

- *The Federal Trade Commission Act of 1914.*

These acts still provide the primary sources of antitrust law effective today. They have been subject to amendment and are the source of an extensive web of regulations used to effectuate these statutes. They provide for both civil and criminal penalties for violations.

3. What entities are charged with carrying out the federal antitrust laws?

The Federal Trade Commission (FTC) is an independent federal agency primarily charged with developing regulations and preventing violations of the federal antitrust laws. The objective of the FTC is to protect consumers by preventing anticompetitive business practices. In pursuit of this objective, the FTC has broad authority to determine what constitutes unfair competition in the market. The FTC issues trade regulations that apply broadly across industries and trade practice rules that guide businesses operating in specific industries. While compliance with FTC practice rules is voluntary, it provides a safe harbor in the event of FTC inquiry into a business's practices.

In the Sherman Act, Congress broadly defined "unfair" methods of competition to allow administrative agency and federal court interpretation to add specificity. Generally, the FTC makes the determination of what it deems to be "unfair". If there is no deception or obvious antitrust violation, the FTC asks three questions, any of which may lead to a finding of unfairness:

- Does the conduct injure consumers significantly?
- Does the conduct offend an established public policy?
- Is the conduct oppressive, unscrupulous, immoral, or unethical?

The FTC has the authority to regulate and take enforcement action against any business for conduct that it deems to be unfair. This may include coordinating efforts with the Department of Justice if the FTC encounters business activity that violates criminal laws.

- ***Discussion***: What do you think about the extent of the FTC's authority to regulate and administer antitrust laws? Does the FTC have too much autonomy in determining what constitutes "unfair" competition? Why or why not? What do the above-referenced questions indicate about the objectives of the FTC in enforcing antitrust law?
- ***Practice Question***: What standard does the FTC apply when determining whether conduct runs afoul of the antitrust laws?
- ***Resource Video***: http://thebusinessprofessor.com/federal-trade-commission-enforcing-antitrust-laws/

ANTITRUST LAWS

4. What is the "Sherman Act of 1890"?

The Sherman Act was the first major federal law passed with the purpose of ensuring competition across and within industries. At the time of its passage, several large companies had nearly complete control over certain industries (steel, oil, and railway) very important to the development of the United States. The effect of this lack of competition was to create exorbitant wealth in a few individuals and higher prices for consumers. The high price to consumers reduced consumption and resulted in lower total economic output.

- *Note*: See Justice Black's opinion in *Northern Pacific Railroad Co. v US*, 36 US 1 (1958) for a description of the Sherman Act purpose.
- *Example*: The most well-known anticompetitive trusts were John D. Rockefeller's Oil Trust (Standard Oil of New Jersey), and J. P. Morgan's Steel Trust (US Steel Corporation). Other examples include Sugar Trust, the Whisky

Trust, the Cordage Trust, the Beef Trust, and the Tobacco Trust.

In response to this reality, Congress passed the Sherman Act, which seeks to preserve competition by prohibiting two types of anticompetitive business behavior:

- Section 1 - *Contracts, combinations, or conspiracies in restraint of trade or commerce,* and
- *Section 2 - Monopolies and attempts to monopolize*.

The Sherman Act fails to define what is a contract, combination, or conspiracy in restrain of trade or a monopoly. As such, much of antitrust law is based in the common law interpretation of federal courts.

- *Note*: The specific types of conduct prohibited under The Sherman Act is discussed below.

- ***Discussion***: Do you think the Federal Government is justified in regulating areas of business industry in this manner? Why or why not? Should business rights be balanced against those of consumers?
- ***Practice Question***: What type of conduct does the Sherman Act prohibit? What are the differences between the protections of Section 1 and Section 2?
- ***Resource Video***: http://thebusinessprofessor.com/what-is-the-sherman-act/

5. What is the "Clayton Act of 1914"?

The Clayton Act is an antitrust law passed to protect consumers by providing a means of preventing early-stage anticompetitive practices. It has a specific focus on the sale of commodities. The Clayton Act is more specific in identifying anticompetitive conduct than is the Sherman Act. It also creates exemptions for certain industries or businesses and establishes an enforcement mechanism to remedy violations of the Act. A notable aspect of the Clayton Act is that it prohibits conduct that does not presently amount to an injury to consumers but has the tendency to lead to consumer injury. In this way, the Act focused on regulating conduct to prevent harm from occurring.

- *Note*: The specific types of conduct prohibited under The Clayton Act is discussed below.

- ***Discussion***: How do you feel about the purpose of the Clayton Act? Should the Federal Government be able to prohibit certain business practices that are not presently anticompetitive based upon their tendency to by anticompetitive?
- ***Practice Question***: What is the regulatory function of the Clayton Act and how is it distinct from the Sherman Act?
- ***Resource Video***: http://thebusinessprofessor.com/what-is-the-clayton-act/

6. What is the "Federal Trade Commission Act of 1914"?

In 1914, the same year that the Clayton Act passed, Congress passed the Federal Trade Commission Act (FTC Act). This act created the Federal Trade Commission, which is an independent administrative agency charged with consumer protection. The FTC bears primary responsibility for enforcing the Sherman Act, Clayton Act, and the regulatory provisions of the FTC Act itself. The FTC pursues civil remedies, while the Department of Justice enforces the criminal (and some civil) provisions of the antitrust laws. State governments and private parties also have the ability to bring civil actions under the antitrust laws seeking civil damages or injunctions.

- *Note*: The specific types of conduct prohibited under The FTC Act is discussed below.

- ***Discussion***: What do you think about centralizing enforcement of antitrust laws with a single administrative agency?

- ***Practice Question***: What federal agency is charged with enforcing the antitrust laws and what is its statutory authority?

- ***Resource Video***: http://thebusinessprofessor.com/what-is-the-federal-trade-commission-act/

THE SHERMAN ACT

The Sherman Act prevents certain contracts, combinations, or conspiracies in restraint of trade or commerce, and industry monopolies and attempts to monopolize. The following are the basic concepts behind the Sherman Act.

7. What is a "contract, combination, or conspiracy" in restraint of trade?

Section 1 of the Sherman Act prohibits "contracts, combinations, and conspiracies in restraint of trade or commerce", but it does not define these types of agreements. Common law surrounding the Sherman Act identifies numerous forms of concerted actions between market competitors or members of the value chain that have the intent or effect of restraining trade in the relevant product or service market. These relationships are generally broken into "vertical restraints" and "horizontal restraints" of trade. The various types of vertical and horizontal trade are discussed individually.

- *Note*: While these above definitions appear to be broad, interdependent or independent activity is not a restraint of trade and will not give rise to a cause of action under Section 1.

- ***Discussion***: What common element do you see among each type of prohibited conduct? Do each of these activities demonstrate the same company intent? Does prohibiting each of these activities seem to serve the same objective?

- ***Resource Video***: http://thebusinessprofessor.com/contract-combination-conspiracy-in-restraint-of-trade/

8. What is "*per se* illegality" and the "rule of reason"?

Section 1 of the Sherman Act broadly prohibits actions that in some way restrain trade. If an action is determined to be a restraint of trade, the following standards apply to determine whether the arrangement is illegal:

- *Per Se Illegal* - A "naked restraint" of trade is one that is explicitly anticompetitive, such as an agreement controlling the price of a good or the output from production. A naked restraint with no pro-competitive justification is generally held to be *per se* illegal. That is, these practices are, by their nature, anticompetitive and thus *per se* illegal. A court will not evaluate any alleged pro-competitive justifications for such activity.

  - *Example*: Agreements setting a minimum or maximum price, output limitations, geographic apportionment of a region, bans on price competition would all qualify as *per se* illegal. Horizontal agreements among competitors are much more likely to be *per se* illegal. In vertical agreements between producer, wholesaler, and retailer, it is often difficult to determine if they are anticompetitive . These types of relationship must be examined under the rule of reason. All of these types of restraint are discussed further below.

- *Rule of Reason* - The rule of reason applies to a restraint that is not deemed a naked restraint. Per Section 1, "every contract, combination, or conspiracy" is illegal if it constitutes undue or "unreasonable" restraint of trade. The test for reasonableness concerns whether the challenged contracts or acts unreasonably restrict competitive conditions in the market or industry. Unreasonableness can be based upon the nature or character of the agreement or surrounding circumstances. The rule of reason balances pro-competitive and anti-competitive effects. In determining whether a restraint of trade is reasonable, the court would consider:

  - facts peculiar to this business,

  - actual and probable effects of restraint (including the effect on competitors);

  - history of the restraint;

  - purpose of restraint;

  - scope of the restraint;

  - convenience to suppliers and consumers; and

  - creation of new products.

  In essence, if the activity promotes competition, it may justify the anticompetitive aspects.

- *Quick-Look (or Truncated) Rule of Reason* - This is a test employed by the court in very limited circumstances. It is feasible that a naked restraint may be legal if there is a pro-competitive justification. Under the quick-look test, a court will allow a defendant to introduce evidence that conduct that would otherwise be *per se* illegal has a pro-competitive aspect. If a pro-competitive justification is plausible, the court will employ a full rule-of-reason analysis.

- ***Discussion***: Why do you think antitrust law allows for multiple standards for determining whether anticompetitive activity is illegal? Why do you think one type of conduct is *per se* illegal while others are not? Should all typically *per se* illegal conduct be treated with the truncated rule of reason? Why or why not?

- ***Practice Question***: ABC Corp is challenged by the Federal Trade Commission as entering into a contract with 123 Corp that restrains trade. What process will the court use to evaluate the contract to determine whether it is illegal?

- ***Resource Video***: http://thebusinessprofessor.com/antitrust-rule-of-reason-and-per-se-illegality/

9. What is a "Monopoly"?

Section 2 of the Sherman Act regulates monopolies or conspiracies or attempts to monopolize any part of interstate or foreign commerce. It is directed at single firms and does not purport to cover shared monopolies or oligopolies.

- *Monopoly* - In *US v. Grinnel Corp*, the federal court defined a monopoly as, "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." "Monopoly power" is generally understood to mean "the power to control prices or exclude competition". The "relevant market" is determined by the geographic area where the product or service is sold, either by the subject party or competitors. Section 2 focuses on acquiring the monopoly through improper means. There must be some anticompetitive conduct, such as exclusionary or predatory practices.

    - *Note*: There must be some monopolistic effect, such as limiting supply or raising prices. This means there must be long-lasting market power, rather than temporary or fleeting power. Any execution of legally acquired market power to acquire or maintain a monopoly may be prohibited.

    - *Example*: Buying up existing competitors in order to secure distribution rights for all products in a given industry would be the willful acquisition of monopoly power.

- *Attempts to monopolize* - In *Spectrum Sports, Inc. v. McQuillan*, the court held that an attempt to monopoly requires proof "(1) that the defendant has engaged in predatory or anticompetitive conduct, (2) with a specific intent to monopolize, and (3) a dangerous probability of achieving monopoly power." The attempt does not have be successful. It is sufficient that there was intent and a dangerous probability of success exists. For conduct to have a dangerous probability of resulting in a monopoly, a court will evaluate the market or industry and the relative power of the business. The same activity by different firms may be illegal based upon the probability of their conduct resulting in monopoly power.

    - *Note*: Competing hard in an industry does not demonstrate an intent to create a monopoly. Intent to monopolize means a specific intent to eliminate competition and to secure singular or monopoly power for a firm.

    - *Example*: Predatory pricing employed with the objective of pushing competitors out of the market may constitute an attempt to monopolize. If the firm has a dangerous probability of achieving its objective, the attempt may be illegal.

- *Conspiracy* - Conspiracy to monopolize requires an agreement between two or more parties with the specific intent of acquiring monopoly power. Following the agreement, it requires at least one overt act to accomplish the objectives. Unlike a cause of action for attempt, an actual ability to achieve a monopoly or a show of power is not required.

- *Example*: ABC Corp agrees to share intellectual property rights and jointly sell a product that will eliminate similar products from the market. The companies begin working together to come up with the common design. This level of cooperation with the specific intent to gain monopoly power for the joint venture would constitute a conspiracy to monopolize.

Often a business will develop monopoly power through a competitive advantage (such as a differentiation or cost strategy). It is important to emphasize that, without the intent to eliminate competition and secure monopoly power, this conduct is not illegal. A business that acquires monopoly power, however, must avoid suppressing competition from potential or existing competitors. Such conduct may constitute an attempt to maintain or extend monopoly power.

- ***Discussion***: How do you feel about the multiple causes of action under Section 2 of the Sherman Act? Do you agree that an attempt to maintain monopoly power that was not illegally acquired should be illegal? Why do you think a cause of action for attempt to create a monopoly requires a showing of a dangerous probability of achieving the objective? Should a conspiracy require a probability of achieving a monopoly or is an overt act in that direction sufficient? Why or why not?

- ***Practice Question***: ABC Corp is a competitor in the cable Internet space. The company has extremely efficient operations and strong customer service. As a result, it holds approximately 55% of the available market share. ABC generally buys any smaller companies that attempt to enter the space. They are also in a price battle with the second largest competitor. They are currently pricing phone plans at a loss in hopes of acquiring a greater market share. There have been preliminary negotiations to halt the price war and to work with the competitor to effectuate an increase in both company's market share. Which of the following activities could be subject to challenge under Section 2 of the Sherman Act? Why?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-monopoly/

10. What businesses are exempt from the provisions of the Sherman Act?

Businesses in certain industries may be exempt from some of the antitrust provisions of the Sherman Act. These businesses do not receive a blanket exemption; rather, they receive specific exemptions for certain practices or activities. Examples of exempted businesses include:

- *State Action Exemption* - State actors (or state-owned entities) are exempt from Sherman Act regulations. This is known as the "*Parker v. Brown* Doctrine". The key is that the state entity must be acting in its sovereign capacity.

- *Lobbying Exemption* - Efforts to lobby government officials is exempt from antitrust regulation, despite the anticompetitive purpose and potential effect. This is known as the "Noerr-Pennington Doctrine". The justification for this exemption is that regulation of lobbying activity may violate an individual's First Amendment rights to petition the government for redress of a grievance. This doctrine extends First Amendment protections to these business organizations.

    - *Note*: Lobbying activity may be actionable as anticompetitive if a company uses efforts to lobby the government with the true purpose of disrupting or interfering with a competitor's business.

- *Patent Law (or Trademark Law)* - Grants of intellectual property rights are exempt from the Sherman Act. For example, awarding the creator of a patented item is a limited form of monopoly granted in that item.

- ***Discussion***: How do you feel about exemptions from antitrust regulation of state actors, intellectual property, and lobbying efforts? What arguments exist for regulating these activities under the antitrust laws?

- ***Practice Question***: Devan works for ABC Corp, a company that installs solar power systems on personal residences. His primary responsibilities are to promote the interests of ABC Corp to state and federal lawmakers. Part of his efforts include seeking the heightened regulation of businesses installing these types of systems. He is trying to push out of the market competitors who cannot meet these heightened regulatory standards. This may have the effect of creating monopoly power in ABC Corp. Is this activity prohibited by antitrust law?

- ***Resource Video***: http://thebusinessprofessor.com/exemptions-from-antitrust-regulation/

ANTICOMPETITIVE ACTIVITY REGULATED BY THE SHERMAN ACT

The various types of conduct regulated by the Sherman Act can generally be divided into horizontal restraints and vertical restraints.

11. What are the commonly recognized types of "horizontal restraint"?

While there are several established types of horizontal restraint, any situation that meets the following elements may be illegal.

- *Agreement* - Was there an agreement between or among market participants?

- *Restraint* - Was there an identifiable restraint of trade? If so, was the restraint:

    - Naked with no pro-competitive justification? If so, it is *per se* illegal.

    - Naked with a pro-competitive justification? Then apply the quick-look rule of reason.

    - Not a naked restraint? Then the rule of reason applies.

Remember, there is no requirement that a business have extensive market power for conduct to be illegal under § 1.

- ***Discussion***: Why do you think a horizontal restraint requires an agreement among two or more businesses? How do you feel about the fact that market power is not required under Section 1?

- ***Practice Question***: ABC Corp sells a product throughout the US. ABC's largest competitor is 123 Corp, which sells a similar product. ABC and 123 enter into an agreement to work together in selling their products. If the arrangement between ABC and 123 is challenged by the FTC, what will a court look at to determine whether the situation constitutes a horizontal restraint of trade that violates antitrust law?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-horizontal-restraint-of-trade/

Below are several horizontal restraints on trade commonly understood to be illegal.

- *Sharing Information* - Under the Sherman Act § 1, sharing of information among competitors with the purpose of restraining trade (i.e., a naked restraint of trade) is *per se* illegal. So, the question of whether information sharing is illegal turns primarily upon whether there is some way the information sharing is or could be harmful to competition and restrain trade. If no, the practice is not a naked restraint and therefore not *per se* illegal. As such, a court will generally apply the rule of reason and look at the actual effect of the sharing activity. Factors used in determining whether information sharing is harmful may include the:

  - *Nature of the Information* - Were the parties are sharing future, present, or past information?

  - *Actions taken by Either Party* - Was there any enforcement of the sharing relationship by either party, monitoring of another party's activity, or coercive mechanisms involved with the sharing of information?

  - *Availability of Information* - Was the information available to insiders, publicly available, or available at a reasonable cost?

  - *Market Structure* - Is the market concentrated to the point that sharing between the parties looks like collusion?

If the pro-competitive justifications outweigh the anti-competitive aspects of the activity, it may not violate the Sherman Act.

  - ***Discussion***: Why do you think the court does not deem the sharing of information among competitors to be *per se* illegal? Do you agree? Why or why not? Do you agree that the above-referenced considerations are adequate for determining whether the sharing of information is *per se* illegal?

  - ***Practice Question***: ABC Corp and 123 Corp occupy 55% of in-store consumer goods sales in the Midwest. ABC Corp regularly shares information with 123 Corp about product sales and customer transactions within its store. 123 Corp, in turn, shares the same information with ABC Corp from its operations. This information is strictly guarded from disclosure to the public or other competitors. If the FTC challenges this sharing of information, what factors would a court consider in determining legality?

  - ***Resource Video***: http://thebusinessprofessor.com/sherman-act-sharing-of-information/

- *Refusal to Deal* **-** Under the Sherman Act § 1, refusals to deal with or boycotts of market participants can be illegal as horizontal restraints of trade. This may be the case when the refusal has anti-competitive aspects but no pro-competitive justification. If the refusal to deal is not a pure restraint of trade, a court would use the rule of reason to determine whether a sufficient restraint of trade is present to make the conduct illegal. The greater the amount of commerce involved in the boycott situation, the more likely it is to be an illegal restraint of trade.

- *Example*: A boycott of a supplier that includes cooperative buying arrangement would be *per se* illegal if the boycotters possess extensive market power or control some element that is essential for competition. If, on the other hand, an agreement to boycott a particular supplier is suggested, it may not be a restraint of trade. But, if the boycott is monitored by either party and enforced in some manner, it is likely a sufficient restraint on trade to be illegal.

- ***Discussion***: What factors should a court use to determine whether a refusal to deal with market participants is a naked restraint of trade? Should the effect on trade be examined before a determining whether conduct is per se illegal? What are the arguments for and against this approach?

- ***Practice Question***: ABC Corp is a large manufacturer of widgets. 123 Corp is a supplier of material parts used in the manufacture of widgets. ABC refuses to deal with 123 Corp and directs all of its purchases to XYZ Corp, which has an agreement to only supply parts to ABC. ABC believes that limiting orders to 123 Corp will reduce volume and push up the cost per unit. This will hurt all of ABC Corp's competitors. Is there any problem with ABC's conduct?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-refusal-to-deal/

- *Horizontal Territorial Agreements* - Under the Sherman Act § 1, a territorial agreement that allocates geographical areas among competitors may be a horizontal restraint of trade. In a horizontal territorial agreement, competing businesses enter into an agreement not to compete with or infringe upon another competitor within an exclusive geographic territory. The agreement not to compete is generally a naked restraint of trade that has no pro-competitive justification. As such, it is *per se* illegal under the Sherman Act.

    - *Example*: ABC Steel Inc., and 123 Steel Inc., are large steel suppliers in the US. They agree to allow ABC to services the entire Northeast and California markets, while 123 is allowed to service the rest of the US. Each company agrees not to sell in the other's territory. This would be a naked restraint of trade with no apparent pro-competitive justification.

    - ***Discussion***: How do you feel about deeming territorial agreements to be illegal? Can you think of a scenario where a territorial agreement could have a pro-competitive justification?

    - ***Practice Question***: ABC Steel and 123 Steel are two of the largest suppliers in the industry. ABC routinely bids against 123 to supply steel in most major construction projects across the country. ABC and 123 enter into an agreement whereby ABC will not bid on projects east of the Mississippi river and 123 will not bid on projects in the West. Are there any legal issues with this agreement?

    - ***Resource Video***: http://thebusinessprofessor.com/sherman-act-territorial-agreement/

- *Horizontal Price Fixing* - Under the Sherman Act § 1, an agreement among competitors to establish a fixed price among all producers or sellers of goods or services is a horizontal restraint of trade. This type of naked restraint on trade is a purely anticompetitive and is *per se* illegal. Businesses may develop all sorts of arrangements to control the ultimate price of a good or service. It does not matter if the fixed prices are fair or reasonable. The anticompetitive aspects of agreeing on a price detriments consumers. This is true even when small competitors agree not to compete in an attempt to remain competitive in a market with larger competitors. (Note: The purpose of increasing the number of competitors in the market does not justify the restraint on trade and the detriment to consumers.) Further, an agreement among competitors to undertake efforts to stabilize a price that otherwise fluctuates is *per se* anticompetitive.

    - *Note*: "Conscious Parallelism" is the practice of competitors following pricing practices without an express agreement. If no collusion occurs, this practice is legal. Another exception to the prohibition against price fixing is when competitors enter into joint ventures for a specific purpose and establish a single price for similar goods. While these types of agreements could still be the subject of challenge, they may not be *per se* illegal.

    - *Example*: Rob's Widgets, LLC and Hank's Widgets LLC both sell the same type of product. They are smaller suppliers in an otherwise large market. They both want to grow their market share, so they agree to charge the same price for their widgets in all circumstances. This is price fixing and is *per se* illegal.

    - ***Discussion***: Do you support the rule that agreements among competitors should be considered per se illegal? Can you think of any pro-competitive justifications for competitors agreeing to set a price?

    - ***Practice Question***: ABC Corp sells similar goods to 123 Corp. ABC and 123 enter into an agreement to price their goods equally. ABC also agrees to match the low price from any local competitor. Are either of these arrangements illegal?

    - ***Resource Video***: http://thebusinessprofessor.com/sherman-act-horizontal-price-fixing/

12. What are the commonly recognized types of "vertical restraint"?

Vertical restraint is an arrangement or agreement between members of a supply chain (such as manufacturers, wholesalers, distributors, or retailers) to fix the price or supply of goods. The following are common types of vertical restraint:

- *Resale Restraint (Vertical Price Fixing & Price Maintenance)* - Under the Sherman Act § 1, an agreement among manufacturers or distributors of a product to control the retail price for a product is an illegal restraint of trade. A manufacturer controlling the final price of a product is known as "vertical price fixing". A manufacturer controlling the maximum price at which distributors can resale a product is known as "price maintenance". Both of these types of agreements have a tendency to reduce competition and harm consumers. Vertical price fixing involving an agreement among competitors is a naked restraint of trade and is *per se* illegal. Resale price maintenance, on the other hand, is not generally considered a naked restraint of trade. As such, a court examining such a relationship will apply the rule of reason to determine if the restraint is anticompetitive and therefore illegal.

- *Note*: Under the Colgate Doctrine, a manufacturer may simply announce its prices and refuse to deal with those who fail to comply with this price structure. However, a manufacturer's attempt at retail price maintenance is illegal if there is coercion or pressure other than the announced policy and its implementation.

- *Example*: ABC Corp Manufactures widgets. 123 Corp is a wholesaler of ABC's widgets. ABC Corp enters into an agreement to force 123 Corp to resell its widget at a specific price. This is price maintenance and is subject to a rule of reason analysis. If ABC Corp attempts to enter into an agreement with a final retailer regarding the sale price of the good, this would be price fixing and is *per se* illegal.

- ***Discussion***: How do you feel about the practice of establishing a price among members of the supply chain? Why do you think vertical price fixing is generally *per se* illegal, while vertical price maintenance is only illegal if there is an anticompetitive effect? Can you think of pro-competitive justifications for these types of agreements?

- ***Practice Question***: ABC Corp is a manufacturer of a special line of car accessories. ABC Corp sells through distributors to retailers. ABC Corp routinely encourages distributors to sell products at a 40% markup, but this is not mandatory. ABC knows that a manufacturer will not be able to charge much more than this, as ABC Corp retains the right to approve all retailers carrying its products. These retailers must agree to charge a specific price for the product in order to carry the product. Are there any legal issues with either of these arrangements?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-vertical-price-fixing-and-maintenance/

- *Exclusive Dealing* - Under the Sherman Act § 1, as well as § 3 of the Clayton Act, exclusive dealing agreements between suppliers and manufacturers can be anticompetitive vertical restraints on trade. In a typical exclusive dealing arrangement, a seller requires that a buyer of a product only purchase that product from that seller. These agreements are essentially requirements contracts. The primary concern is that manufacturers are foreclosed from entering the market due to these exclusive dealing relationships with established manufacturers. This is not generally considered a naked restraint on trade. As such, a court would evaluate such an agreement under the rule of reason and examine its pro-competitive justifications.

    - *Note*: Pro-competitive reasons for exclusive dealing contracts are that buyers may be assured of supply at a given price and sellers may be assured of customers. Further, if a buyer is required to buy one brand, it may help to promote that brand and enhance inter-brand competition. Also, exclusive dealing may lessen free riding on one brand's promotional efforts.

    - *Example*: ABC Corp is a manufacture of widgets. ABC will only sell its widgets to sellers who agree to only purchase widgets from ABC. 123 Corp enters into one of these agreements. In this situation, a court would apply the rule of reason to determine if the agreement is anticompetitive and illegal. ABC Corp would need to demonstrate a pro-competitive justification for its policy.

- ***Discussion***: How do you feel about the legality of exclusive dealing arrangements? Should these arrangements be subject to the rule of reason or *per se* illegal? Why? Do the pro-competitive justifications listed in the material note affect your opinion? Why or why not?

- ***Practice Question***: ABC Corp is the sole manufacturer of certain parts used in the assembly of touch screen devices. While it is possible to manufacture devices without using these parts, it is difficult to produce a product of similar quality. 123 Corp is the largest manufacturer of touch screen devices. 123 seeks an exclusive dealing relationship with ABC Corp to purchase all parts that ABC manufactures. 123 offers ABC a price well above its current price to secure this deal. Is there any problem with this proposed relationship?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-exclusive-dealing-arrangements/

• *Tying* **-** Under the Sherman Act § 1, as well as § 3 of the Clayton Act, tying the purchase of one product to the purchase of another competitor's product may be anticompetitive and a restraint of trade. Tying, in its most basic form, is when a seller requires that a buyer agree that if seller sells product A, the buyer can only buy product B from the seller (or another identified seller). In order to be illegal, this practice must have a substantial impact on trade or commerce. To have a substantial effect on trade, a seller must generally hold substantial market power. As such, a tying arrangement must generally have the following elements:

- *2 or More Products* - The sale of one product, the tying product, is tied to the buyer also purchasing a separate product - the tied product.

- *Coercion* - Buyers are coerced by the tying relationship to purchase the tied product.

- *Market Power* - The defendant must have substantial market power in the tying product.

- *Commercial Impact* - The tying arrangement forecloses a substantial volume of commerce in the tied product (affects competition).

Tying situations are very common when a company sells an industry-leading product and also sells accessories to that product.

- *Example*: ABC Corp is the only seller of a specific type of farm equipment. 123 Corp also sells an attachment to ABC's equipment that is sold by a number of other firms in the market. ABC requires that anyone buying the piece of equipment must also purchase the attachment from 123. This is product tying and may be a restraint of trade.

Tying arrangements are generally not considered a naked restraint of trade. If the above elements are present, a court will examine to see if there are any pro-competitive justifications for tying. Examples of pro-competitive justifications include:

- *Product Quality* - The seller may claim that selling the products together ensures functionality or quality of operation. This argument may be effective when operational effective relates to the company's brand or strategic position.

- *Single Product* - A seller may be able to demonstrate that the two items should be treated as one single product. For example, it is sensical for a car manufacturer to include wheels and tires on a vehicle when selling it to dealers.

- ***Discussion***: How do you feel about tying relationships between products? Should these arrangements be illegal? Why or why not? Does it affect your opinion if the tied products are sold by the same seller? Are you convinced by the competitive justifications for tying arrangements?

- ***Practice Question***: ABC Corp sells a particular type of widget. The widget is compatible with components sold by lots of other vendors. ABC Corp requires that any purchaser of an ABC Corp must also purchase an ABC component. What factors will the court review in determining whether this situation is illegal?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-product-tying/

- *Vertical Territorial Agreements* - A vertical territorial agreement is an agreement between a manufacturer and a distributor of a product that grants an exclusive territory in which to distribute the product. The manufacturer agrees not to sell to other distributors in that territory in exchange for the dealer agreeing not to operate outside of her assigned area. These types of arrangements are very common and are not naked restraints on trade. If, however, such an agreement has the effect of restraining trade in the area, it may be illegal. If such actions are challenged, a court will apply the rule of reason in determining whether the conduct is sufficiently anticompetitive to constitute an illegal restraint on trade.

    - *Example*: ABC Corp enters into agreements with 123 Corp, 456 Corp, and 789 Corp to distribute its product in specific geographic areas. If ABC Corp is the sole manufacturer of a vital consumer product, these agreements could thwart competitive selling by the distributors. As such, it could have a negative impact on the price customers pay. If ABC Corp cannot generate a pro-competitive justification, it may be deemed illegal.

- ***Discussion***: How do you feel about vertical territorial agreements? Can you think of situations in which these agreements would restrain trade? Can you think of pro-competitive justifications for such arrangements?

- ***Practice Question***: ABC Corp manufactures and distributes products across the US. The products that ABC produces require lots of a particular type of precious metal. It is difficult to find suppliers of this material. ABC has agreements with companies throughout the US. ABC entered into exclusive sale and purchase agreements with companies in different regions of the US. What will a court evaluate to determine whether these agreements are legal? What arguments might ABC put forward in defense to these agreements?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-vertical-territorial-agreements/

13. What is "monopolization" under the Sherman Act?

The Sherman Act § 2 makes illegal the willful acquisition or maintenance of monopoly power in a relevant market when such power is the result of something other than pure competition. Simply possessing monopoly power is fine if such power results from a superior product, better processes, stronger business acumen, or other form of competitive advantage. Obtaining such market power is illegal when it is the result of some act or series of actions that have an anticompetitive effect in the market. Below are some common examples of monopoly power obtained through anticompetitive means:

- *Exclusionary Act* - Monopoly power obtained through an exclusionary act is prohibited. If a competitor undertakes an anticompetitive act that harms the competitive process in the market (not just a single competitor in the market), that act is illegal. Examples of anticompetitive, exclusionary acts may include:
    - *Closing of Resources* - Buying up raw materials (especially if you do not need them) to the exclusion of other competitors;
        - *Note*: This does not exclude material purchases that have an operational or financial objective that is not anticompetitive.
        - *Example*: Buying up all raw material, particularly when a quantity is not needed or will go to waste, in an attempt to cause shortages with other competitors may be anticompetitive.
    - *Exclusive Sales Agreements* - Enforcing agreements with suppliers requiring them not to sell to your competitors:
        - *Note*: This may also run afoul of § 1.
    - *Tying Relationships* - Tying the sale of one product to the purchase of a separate product;
        - *Note*: This practice may also run afoul of § 1.
    - *Forced Acquisition* - Forcing a competitor to sell its business to you to eliminate competition;
        - *Example*: Threatening a price war and market blacklisting if a company does not agree to be purchased.
    - *Mandatory Leasing* - Requiring long-term leases or foreclosing a secondary market by leasing and not selling a product are examples of exclusionary acts.
        - *Example*: ABC Corp has proprietary machinery that it will only lease (rather than sell) to customers. This causes a lack of secondary market for this type of equipment and provides ABC with monopoly power in the market.

The acquisition of monopoly power will be reviewed pursuant to the rule of reason. If a court determines that an anticompetitive effect exists, the defendant may offer a pro-competitive justification for the activity.

- *Example*: A competitor may be able to demonstrate that the activity is pursuant to simple product improvement or meeting consumer demand. The court will then determine whether the anticompetitive harm outweighs the pro-competitive justification.

• *Refusing to Deal* - Acquiring monopoly power in a market may be illegal under Sherman Act § 2 if such power is obtained through refusal to deal with competitors. Generally, there is no duty for a competitor to deal with other competitors. There are, however, exceptions to this rule when a refusal to deal has no valid business justification and the refusal is economically harmful to market competition in the long run. Generally, the refusal must be part of a scheme intended to result in increased market power for the company.

- *Note*: There is a general presumption that a refusal to deal is legal. A plaintiff challenging the refusal must demonstrate the anticompetitive effects and the presence of monopoly power.

- *Example*: ABC Corp sells cell phones and electronic components. ABC refuses to sell components to 123 Corp, which sells cell phones. The refusal to deal with competitors is generally permissible. If, however, ABC and 123 are the only sellers of smartphones in the US, failing to serve as a component supplier to 123 Corp may be anticompetitive. In such a case, the court would employ the rule of reason to determine legality.

• *Predatory Pricing* - Predatory pricing exists where one competitor prices a product arbitrarily low in an effort to monopolize a market. The low price is used to force competitors out of the market. The Sherman Act § 2 makes such conduct illegal *per se*. Proving a predatory pricing case requires a demonstration of a competitor's predatory pricing purpose and the dangerous probability that the competitor will recoup those loses by raising prices after other firms are driven out of the market.

- *Example*: ABC Corp sells the same product as 123 Corp. ABC Corp drops its price to below its average variable cost and thus takes a loss on each sale. ABC's objective is to take all sales from 123 Corp. ABC can withstand the losses until 123 Corp is forced out of business. Once 123 Corp is defunct, ABC Corp will raises prices again.

- ***Discussion***: Why do you think the law provides exemptions for monopolies acquired through competitive means? How is the effect on the market different when a company acquires a competitive (rather than anticompetitive) monopoly? Do you agree that monopoly power acquired through any of the above-listed, exclusionary acts should be reviewed as anticompetitive?

- ***Practice Question***: ABC Corp is a major player in its industry. It has come under the scrutiny of the FTC for possessing excessive market power bordering on that of a monopoly. ABC maintains that it gained its industry position through competitive means. What will the FTC look for in examining whether ABC holds an illegal monopoly?

- ***Resource Video***: http://thebusinessprofessor.com/sherman-act-monopolization/

CLAYTON ACT ANTITRUST CASES

The Clayton Act was passed to protect against anticompetitive activity in the purchase or sale of commodities. The Act covers only the sale of goods, not services.

14. What is "Price Discrimination"?

Price discrimination under the Clayton Act means charging a different price for a commodity based upon something other than quality, quantity, or cost of selling. The Robinson-Patman Act, an amendment to the Clayton Act § 2, addressed the issue of a seller charging purchasers of commodities different prices. This practice can be anticompetitive when the price is below costs and gives one customer a competitive edge in the market that is not related to operational superiority. A claim under the Robinson-Patman Act must meet the following requirements:

- *Commodities* - It involves the purchase of commodities.
- *Like Kind & Quality* - The commodities must be effectively the same.
- *Injury to Competition* - There must be some effect on the market (interstate commerce), in either:
    - *Primary line* - The reduction of prices for a buyer in a specific region causes an injury to competitors in that market.
    - *Secondary Line* - Buyers who are customers of a seller's supplier receive a particular discount.

This rule protects smaller buyers who cannot secure the advantages of larger buyers. Ensuring equal prices for resellers of commodities promotes competition. Specifically prohibited conduct includes:

- Section 2(c) - limits brokerage commissions related to the sale of goods.
- Section 2(d) - outlaws granting promotional allowances or payments on good bought for resale, unless such allowances are available to all competing customers.
- Section 2(e) - prohibits giving promotional facilities or services on goods bought for resale, unless they are made available to all competing customers.

The statute also makes predatory pricing illegal outside of the context of Sherman Act § 2, which primarily covers pricing below marginal cost for a prolonged period to drive out competition. The Clayton Act does allow for defenses to or justifications for price discrimination, including:

- *Cost Justification* - Price differentials based on differences in the cost of manufacture, sale, or delivery of commodities are permitted.
- *Good-faith Defense* - A seller in good faith may meet the equally low price of a competitor.

Either of these defenses are a pro-competitive justification that might outweigh the restraints placed on competition.

- ***Discussion***: Why do you think the Clayton Act focuses on vertical price discrimination by sellers of commodities? Do you think the limitations expressed above achieve these objectives? Can you think of other methods of regulating price discrepancies between purchasers?

- ***Practice Question***: ABC Corp is a seller of industrial cement. ABC prefers to sell in large quantities because of the lower warehousing and shipping costs. ABC particularly likes to deal with 123 Corp, which has its own warehousing and logistics system that ABC Corp may employ when selling 123 cement. As such, ABC provides special deals and incentives to 123 Corp, which has helped 123 Corp dominate the commercial construction market. If ABC's practices are challenged by the FTC, what would a court examine to determine legality?

- ***Resource Video***: http://thebusinessprofessor.com/clayton-act-price-discrimination/

15. What are "special arrangements" prohibited by the Clayton Act?

Section 3 of the Clayton Act limits the use of certain types of contracts involving goods when the impact of these contracts may substantially lessen competition or tend to create a monopoly. These contracts may be *per se* illegal if monopolistic behavior is present. Examples of contractual arrangements that may tend to lessen competition or create a monopoly include:

- *Exclusivity Contracts* - Many supply contracts, requirements contracts, and exclusive dealing agreements are *per se* illegal. The primary concern is that manufacturers are foreclosed from entering the market due to these exclusive dealing relationships with established suppliers (and vice versa). The Clayton Act § 3 only applies to situation when a seller requires a buyer to only purchase from it or another seller. It generally does not apply to situation when a buyer requires that a seller refrain from selling to other buyers. This situation may, however, violate Sherman Act § 1. Legality turns on the question of whether the activity substantially lessens competition. To make this determination, the court will look at:

    - *Line of Commerce* - Does this activity prevent competitors for achieving a sustainable size? If economies of scale do not require competitors to be a certain size in order to compete in the market, the exclusivity contract is less likely to be illegal.

    - *Area of Effective Competition* - How large is the geographic limitation on competition? The court will examine the extent to which sales boundaries are confined and potential effect in that region.

    - *Barriers to Entry* - How difficult is it for new competitors to enter the market?

    To be illegal, the agreement must have a tendency to foreclose competition in a substantial share of the relevant geographic area and line of commerce. A defendant may be able to rebut a Clayton Act § 3 allegation by demonstrating that:

    - There is no foreclosure of competition;

    - The contract is short-term in nature;

- There are other available modes of distribution; or
- The pro-competitive aspects of the agreement may outweigh the anticompetitive effects under the rule of reason.

One exception is a franchise agreements that requires that all goods purchased come from the franchisor. These are legal, so long as the product is linked to quality of goods. Sourcing things not related to quality of goods cannot be prohibited through a "exclusive source of supply" provision. A challenge to a franchise agreement is subject to the rule of reason.

- ***Discussion***: How do you feel about making exclusive purchase agreements illegal? Do you believe the above-listed factors demonstrate anticompetitive effects in the market? Does the ability to rebut these concerns affect your opinion? Why or why not?
- ***Practice Question***: ABC Corp is the seller of hydraulic fluid. ABC requires that many of its customers only purchase ABC's products. What will the court examine to determine whether these requirements are legal?
- ***Resource Video***: http://thebusinessprofessor.com/clayton-act-section-3-special-arrangements/

- *Tying Contract* - A tying contract is one in which a product is sold or leased only on the condition that the buyer purchase a different product or service from the seller or lessor. A common type of tying, known as "full-line forcing", is where a seller compels the buyer to take a complete product line from the seller. That is, the buyer cannot purchase just one product in the line. Another situation involves tying unpatented products to a patented product. Such a practice is *per se* illegal if the following elements are present:
    - *Separate Products* - The tying and tied product are two separate products;
    - *Market Power* - The defendant has substantial market power in tying the product market;
    - *Forecloses Trade* - The tying agreement prevents a substantial amount of trade in the relevant market;
    - *Forced Sale* - The defendant effectively forces a substantial number of customers to purchase the tied product under conditions where they may otherwise look to other sellers in the market;
    - *Harm to Competition* - There must be an identifiable lessening of competition in the market, and
    - *No Competitive Justification* - No legitimate pro-competitive justification exists.

  The general defenses of maintaining company goodwill, pro-competitive or strategic objectives, and generating market efficiencies are available to combat a finding of anticompetitive effect.

    - *Example*: A common example of an illegal tying arrangement involves tying a patented drug to an unpatented medicine dispenser. This seeks to extend the monopolistic rights allowed to patent holders to non-patented items.

- ***Discussion***: How do you feel about prohibiting tying goods from a single provider? Do you believe the above-listed elements are sufficient to identify anticompetitive practices? Why or why not? Should general, pro-competitive defenses be sufficient to justify tying contracts? Why or why not?

- ***Practice Question***: ABC Corp carries a line of products. One of its products is subject to a utility patent and is the only product of its type currently on the market. Lots of market competitors make accessories for this product. ABC, however, requires that any purchaser of this product also purchase several of ABC's accessory products? If the FTC challenges these sales agreements, what elements would a court use to determine whether the practice is anticompetitive?

- ***Resource Video***: http://thebusinessprofessor.com/clayton-act-tying-arrangements/

- *Reciprocal Dealing Contracts* - This is an agreement where a buyer offers to buy a seller's goods under the condition that the seller buy other goods from the original buyer. These agreement are only illegal if there is a distinct anticompetitive objective with a substantial effect on the product market. Any pro-competitive justification may serve as a defense to a challenge to these practices.

  - *Example*: ABC Corp agrees to purchase machinery that distributes chemicals from a 123 Corp if the 123 agrees to purchase all of the chemicals from the ABC. This conduct will be illegal if a challenger can demonstrate that ABC and 123 have an anticompetitive objective that substantially affects the market for farmers purchasing these machines and chemicals.

- ***Discussion***: How do you feel about banning reciprocal dealing agreements that deemed anticompetitive? Can you think of situations where such an agreement would have an anticompetitive effect in the market? Can you think of any pro-competitive justification for these arrangements?

- ***Practice Question***: ABC Corp and 123 Corp are manufacturers of material used in radios. ABC Corp supplies rubber materials to 123 Corp. 123 Corp supplies glass materials to ABC Corp. They have an exclusive, reciprocal dealing agreement. Under what conditions might this relationship be subject to challenge?

- ***Resource Video***: http://thebusinessprofessor.com/clayton-act-reciprocal-dealing-arrangements/

16. How does the Clayton Act regulate "mergers and acquisitions"?

The Clayton Act § 7 makes certain mergers and acquisitions illegal. Basically, one company cannot acquire another company's stock or assets (or otherwise combine with another entity) if the combination is reasonably likely to substantially lessen competition or tend to create a monopoly. Such activity may also be illegal under Sherman Act § 2 if such activity results in a company acquiring monopoly power following the transaction. Mergers are generally classified as horizontal, market extension, vertical, or conglomerate.

    - *Note*: Originally the Clayton Act only prohibited horizontal mergers. The Celler-Kefauver Amendment to the Clayton Act covers vertical mergers that lessen competition.

- *Horizontal Merger* - A horizontal merger combines competitors or two businesses in the same industry. To determine whether such a merger is anticompetitive, begin by defining the product and geographic market. These two factors define the market share of each entity. If the merger will result in less competition, it may be illegal. The court may examine any justifications for the anticompetitive activity, such as:

    - procompetitive results of the merger, or the offsetting pro-competitive market responses, such as new competitors entering the market; and

    - gains in the market efficiency.

- *Vertical Merger* - A vertical merger brings together companies that are in the same chain of commerce. That is, it brings together buyers and suppliers. Such a merger may be illegal where it will:

    - erect barriers to entry for competitors,

    - promotes collusion, or

    - allows the companies to evade regulations.

  In reviewing a vertical merger, a court may consider the pro-competitive attributes of the merger.

- *Conglomerate Merger* - This type of merger is between non-related businesses. These businesses do not compete or operate in the same chain of commerce. This type of merger is illegal when it effectively makes it difficult for new competitors to enter the market.

    - ***Discussion***: How do you feel about the regulation of mergers as potentially anticompetitive activity? Do you think the factors listed above are adequate to demonstrate an anticompetitive effect on the market? What pro-competitive justifications might justify some of these mergers?

    - ***Practice Question***: ABC Corp is a manufacturer of televisions. 123 Corp is a primary supplier of glass used in HD televisions across the market. ABC Corp buys all of its glass from 123 Corp. 123 Corp also sells to XYZ Corp, the largest competitor to ABC Corp in the television manufacturing space. ABC Corp needs to spend any excess corporate cash and is considering a buyout of 123 Corp or XYZ Corp. If the FTC decides to challenge either of these mergers, what factors would the court apply in making a determination of legality?

    - ***Resource Video***: http://thebusinessprofessor.com/clayton-act-mergers-and-acquisitions/

17. What is the “Federal Trade Commission Act “and how does it regulate unfair competition?

The FTC Act §5 proscribes "unfair or deceptive acts or practices" and "unfair methods of competition." Violations for the Sherman Act and Clayton Act will also violate the FTC Act, so most challenges are raised pursuant to those Acts. The Federal Trade Commission Act, Sherman Act, and Clayton Act, serve to "protect the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up." The FTC enforces all of the federal antitrust laws.

- *Note*: This broad authority includes protection for consumers from false advertising practices.

The primary importance of the FTC Act is the regulatory and enforcement authority that it vests in the FTC, which include:

- *Regulatory Authority* - The FTC promulgates regulations to effectuation the objectives of the relevant statutory law;
- *Investigate* - The FTC investigates allegations against individuals or organizations alleged to violate antitrust law;
- *Civil Actions* - The FTC may bring civil actions halt or seek redress for activity violating the antitrust laws;
    - *Note*: This includes issuing cease and desist order to curb unfair corporate practices.

- ***Discussion***: How do you feel about the extent of enforcement and regulatory authority vested in the FTC? Why do you think the FTC Act provides a second layer of prohibition against anticompetitive practices?
- ***Practice Question***: ABC Corp faces scrutiny from the FTC over its growth and business practices. What is the authority of the FTC in seeking to prevent unfair, deceptive, and anticompetitive practices?
- ***Resource Video***: http://thebusinessprofessor.com/federal-trade-commission-act-antitrust-deceptive-practices/

18. What sanctions are available under the antitrust laws?

Together the Sherman Act, Clayton Act, and FTC Act allows for four legal sanctions:

- *Injunctions of Activity* - Injunctions order a party not to violate or continue violating antitrust provisions. These can be administrative or judicial.
- *Treble (triple) Damages* - Plaintiffs may recover civil damages suffered as a result of violation of the antitrust laws. Section 4 of the Clayton Act authorizes victims in a civil action (private parties or the US Government) to collect three times the damages they have suffered, plus court costs and reasonable attorneys' fees.
- *Criminal Fines and Imprisonment (felonies)* - Individuals fined up to $1 million and 10 years in prison. Corporations may be fined up to $100 million per offense.
- *Nolo Contendere* - Defendant's will often plead *nolo contendere* in a criminal action and focus on defending the civil action case. The reason is that a criminal conviction is largely conclusive in proving violation in the civil court. A *nolo contendere* plea avoids this scenario.

The FTC, DOJ, state governments, and private parties may bring actions to enforce antitrust laws and may seek any combination of the above sanctions.

- ***Discussion***: How do you feel about the sanctions associated with violations of the antitrust laws? Should there by criminal penalties attached to this conduct?

- ***Practice Question***: MicroData, Inc, produces software for use personal computers. MicroData has been pricing its product at below its cost of production in an effort to force its primary competitor, DataServe, out of the market. MicroData received a cease and desist order from the FTC, but it has continued the practice. What are the possible sanctions that MicroData could face in this situation?

- ***Resource Video***: http://thebusinessprofessor.com/sanctions-under-antitrust-law/